Supreme Court, U.S.
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No. 99-1575

IN THE

Supreme Court of the United States

JOHNSON COUNTY BOARD OF COUNTY COMMISSIONERS,

Petitioner,

v.

SOUTHWESTERN BELL WIRELESS, INC., fka SOUTHWESTERN BELL MOBILE SYSTEMS, INC., as General Partner of Kansas City SMSA Limited Partnership; and KANSAS CITY SMSA UNLIMITED PARTNERSHIP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' OBJECTION TO QUESTIONS PRESENTED IN PETITIONER'S PETITION

The Respondents, according to Rule 15.2, object to Petitioner's question presented. The sole question presented is:

> Did the Tenth Circuit correctly conclude that the Federal Communications Act of 1934, as amended, impliedly preempts Petitioner's attempts to regulate radio frequency interference ("RFI") through its "Interference Amendment" to its local zoning regulations?

CORPORATE DISCLOSURE STATEMENT OF SOUTHWESTERN BELL WIRELESS, INC., F/K/A SOUTHWESTERN BELL MOBILE SYSTEMS, INC., AS GENERAL PARTNER OF KANSAS CITY SMSA LIMITED PARTNERSHIP; AND KANSAS CITY SMSA UNLIMITED PARTNERSHIP

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, Respondents, by and through their attorneys, respectfully submit this corporate disclosure statement:

> Southwestern Bell Wireless, Inc. is 80% owned by Southwestern Bell Mobile Systems, Inc. (SBMS) and 20% owned by Pacific Telesis Group (PTG). SBMS and PTG are wholly owned by SBC Wireless, Inc., which is wholly owned by SBC Communications, Inc.

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INTRODUCTION

Petitioner ambitiously attempts to make a "federalism case," out of a relatively straightforward declaratory judgment action involving well-established principles of preemption of local government action by federal law. What is clear from the Petition, however, is that this case presents no "conflict" among the lower courts, no important and unresolved question of constitutional law and no other important, unresolved question of federal law.

Respondents instituted the underlying action seeking declaratory and injunctive relief pursuant to 28 U.S.C. § 2201, 47 U.S.C. § 332(c)(7) and K.S.A. § 19-2964. In particular, Respondents sought to establish that Petitioner's attempts to regulate radio frequency interference ("RFI") through its adoption of certain amendments to its zoning regulations for communication towers and communication antennae (collectively referred to as the "Interference Amendment"), and the conditioning of its approval of Respondents' application for a conditional use permit on compliance with said amendment, was illegal and unreasonable because they violated the Federal Communications Act of 1934, as amended. Given the fact this case solely involved a matter of law, *i.e.*, the issue of preemption of Petitioners' Interference Amendment to its zoning regulations, Respondents promptly filed a Motion for Summary Judgment. The district court below granted summary judgment in favor of Respondents, invalidating Petitioner's regulation, as impliedly preempted by federal law, and rejecting Petitioner's contention that such preemption violated the Tenth Amendment's reservation of state powers.

On appeal, Petitioner challenged the district court's conclusions and further contended that the district court's order was over-broad and that issues of fact precluded summary judgment. The court of appeals below rejected Petitioner's contentions and affirmed the district court's decision holding that: (i) Petitioner's attempts to regulate RFI through its amendments to its zoning regulations were impliedly preempted by federal law; (ii) this preemption did not violate the Tenth Amendment; (iii) the district court's order was not over-broad; and (iv) the district court did not otherwise err. (Pet. App. A, 2a).

Petitioner's Statement of the Case erroneously suggests that the Interference Amendment at issue is a mere "zoning" regulation, which focuses only on public safety issues and does not substantially regulate in a federal area of concern or impact national uniformity issues. (Pet. 6). As recognized by the court below, however, Petitioner's Interference Amendment "extends beyond traditional zoning authority (*i.e.*, placement, construction and modification) and into radio telecommunications, an area of FCC [exclusive] authority." (Pet. App. A, 10a-11a). Under Petitioner's Interference Amendment, communications towers and antennae cannot operate in a manner that interferes with public safety communications. (Pet. 4). The Interference Amendment grants the county's zoning administrator authority to determine when interference exists and, after notice and opportunity for a hearing, to force the antenna site to cease operations. (Pet. App. A, 3a-4a). The Interference Amendment provides, in pertinent part, as follows:

> (2) [The permit holder] *shall be responsible, immediately upon notification by the zoning*

administrator or the public safety agency, to investigate the cause of the interference, disruption, or degradation and to determine a method . . . to *remedy* the problem.

. . .

(3) [The permit holder] *shall* within 24 hours after receiving notice of the disruption, *remedy the problem or show to the satisfaction of the zoning administrator* that the tower or other site equipment is not the cause of the interference or disruption. If the interference . . . causing the functional interruption is not remedied within the 24 hours, then the *zoning administrator may upon two days written notice to the [permit holder], set a hearing to show cause why the applicable Permit shall not be terminated and the site . . . shall not cease operation* until the problem is remedied. The hearing shall be temporarily stayed [for two days], however, if the [permit holder] seeks immediate technical assistance and advice . . . from the FCC.

. . .

(5) [The permit holder] shall be responsible for the payment of costs to cure the interference . . . including the fees of any experts retained to identify or correct the problem. . . .

(Pet. App. A, 4a-5a).

Because the court below properly applied this Court's well-established legal standards governing preemption analysis in its review of Petitioner's Interference Amendment, it correctly concluded that Petitioner's attempts at regulating RFI were subject to preemption by the Federal Communications Act of 1934, as amended. As such, no basis exists for review and this Court should deny the Petition.

REASONS FOR DENYING THE WRIT

I. THE COURT'S DECISION BELOW WAS IN ACCORD WITH THIS COURT'S PRIOR DETERMINATIONS CONCERNING THE COMPREHENSIVE AND EXCLUSIVE JURISDICTION OF THE FCC OVER "TECHNICAL MATTERS", SUCH AS RFI, ASSOCIATED WITH THE TRANSMISSION OF BROADCAST SIGNALS AND ACCORDINGLY, PRESENTED NO UNRESOLVED IMPORTANT QUESTION OF FEDERAL LAW.

Petitioner argues that the issue of implied preemption by the "comprehensive and exclusive nature of the federal regulatory scheme developed under the Federal Communications Act of 1934, 47 U.S.C. § 151, *et seq.*, as amended," over its Interference Amendment has not *directly* been decided by this Court. While it is true this Court has not *directly* decided this issue with respect to Petitioner's particular "Interference Amendment," which expressly prohibits RFI with public safety communications, this Court has **directly** recognized the FCC's exclusive jurisdiction over "technical matters, such as frequency allocation. . . ." regarding radio signal transmissions. *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 430 n.6,

83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963), *citing* 47 U.S.C. § 301. Moreover, in discussing the breadth of the FCC's authority over matters such as RFI, this Court has further observed that "[t]he Communications Act . . . expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission," *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940), in order to "secure the maximum benefits of radio to all of the people of the United States." *National Broadcasting Co. v. United States*, 319 U.S. 190, 217, 63 S. Ct. 997, 87 L. Ed. 1344 (1943). Because, as recognized by the courts below, Petitioner's Interference Amendment focuses on operational and performance matters regarding telecommunications towers, *i.e.*, expressly prohibiting and providing mechanisms for responding to RFI with public safety communications, it impermissibly extends into the "technical matters" arena of exclusive FCC authority, which has been **directly** recognized by this Court. (Pet. 4; Pet. App. A, 4a-5a, 10a-11a).

II. PETITIONER'S CONCERNS OVER THE TENTH CIRCUIT'S ALLEGED LACK OF CONSIDERATION AS TO "WHETHER THE LOCAL REGULATION COULD CONSTITUTIONALLY CO-EXIST WITH FEDERAL LAW REGULATIONS," PRESENTS NO QUESTION FOR THIS COURT AS FIELD PREEMPTION EXISTS.

Federal law preempts state or local law in three situations:

> (1) When Congress, in enacting a federal statute, has expressed a clear intent to preempt state law;

> (2) When it is clear, despite the absence of explicit preemptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has thereby left no room for the states to supplement federal law; ***or***
>
> (3) When compliance with both state and federal law is impossible or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699, 104 S. Ct. 2694, 2700, 81 L. Ed. 2d 580 (1984) (citations omitted) (emphasis added).

The above three alternative methods of federal law preemption have commonly been referred to as: (1) express preemption; (2) field preemption; and (3) conflict preemption. *See, e.g., Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31, 116 S. Ct. 1103, 1108, 134 L. Ed. 2d 237 (1996). This Court has defined the second of these alternative methods as follows:

> Field preemption may be inferred if a federal scheme of regulation is so pervasive that Congress must have intended to leave no room for a state to supplement it or if an act of Congress touches a field in which the federal interest is so dominant the federal system is assumed to prohibit enforcement of state laws on the same issue.

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947); *see also Hines v.*

Davidowitz, 312 U.S. 52, 61 S. Ct. 399, 85 L. Ed. 581 (1941). As recognized by this Court, the Federal Communications Act of 1934, as amended, provides comprehensive regulation in the field of technical radio communications, leaving no room for supplementation by state or local authority. *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. at 214 (Communications Act of 1934 created a unified and comprehensive regulatory system for the [radio transmission] industry.); *Head*, 374 U.S. 424, 430 n.6 (noting FCC's exclusive jurisdiction over technical matters regarding radio signal transmission.) Accordingly, the courts below correctly found field preemption of Petitioner's Interference Amendment.[1]

Given that field preemption of RFI was found to exist, it was not necessary to look at the third alternative type of preemption, *i.e.* conflict preemption, in order to determine if, in fact, the Petitioner's Interference Amendment could constitutionally co-exist with federal law. *See City of New York v. FCC*, 486 U.S. 57, 63, 108 S. Ct. 1637, 100 L. Ed. 2d 48 (1988) (noting that *beyond* conflict preemption, in proper circumstances, it may be determined that a federal agency's authority on a given issue is exclusive and preempts any state effort to regulate in the forbidden area.) *See also Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 716, 105 S. Ct. 2371, 2376, 85 L. Ed. 2d 714 (1985) (noting that even in cases of local regulation of matters related to health and safety, implicit preemption may exist where it is the "clear and manifest" intent of Congress or an agency acting pursuant to congressional delegation to preempt the field.).

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1. The district court below also found conflict preemption to exist. (Pet. App. B, 32a-34a).

III. PETITIONER'S CONCERN OVER "WHETHER THE TENTH AMENDMENT LIMITS THE POWER OF FEDERAL LAW IN PREEMPTING, BY IMPLICATION, THE AUTHORITY OF LOCAL GOVERNMENT" TO REGULATE MATTERS OF PUBLIC SAFETY DOES NOT PRESENT A QUESTION FOR THIS COURT AS THIS COURT HAS PREVIOUSLY HELD PREEMPTION PRINCIPLES APPLY EVEN TO MATTERS OF SPECIAL CONCERN TO THE STATES AND RFI REGULATION IS NOT A TRADITIONAL LOCAL INTEREST, BUT RATHER A NATIONAL INTEREST PREEMPTED BY FEDERAL LAW.

Petitioner next argues that this Court should exercise its discretionary jurisdiction to "consider and rule upon a fundamental issue of federal constitutional law," *i.e.*, whether the Tenth Amendment limits the power of federal law to preempt local government in its regulation of matters of special concern, *e.g.*, public safety. This Court has, however, previously addressed this issue and need not now exercise its discretionary jurisdiction to revisit that issue.

In *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982), this Court noted that preemption of law principles apply even to "matter[s] of special concern to the states" and "the relative importance to the state of its own law is not material . . . for the Framers of our Constitution provided that federal law must prevail." Moreover, as recognized by the courts below, where as here, it is the "clear and manifest" intent of Congress to preclude state or local regulation of a given area, *e.g.*, RFI, even a legitimate exercise of a local government's police power can be preempted. *See, e.g., Wisconsin Pub. Intervenor v.*

Mortier, 501 U.S. 597, 605 (1991); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Although Petitioner repeatedly attempts to characterize its Interference Amendment, as nothing more than a legitimate exercise of its police powers, as noted by the court below, Petitioner's regulation expressly prohibits RFI with public safety communications and "RFI regulation is not a traditional local interest, but a national interest preempted by federal legislation." (Pet. App. A15a-16a). As stated by the FCC:

> [F]ederal power in the area of [RFI] is exclusive; to the extent that any state or local government attempts to regulate in this area, their regulations are preempted.

See In the Matter of 960 Radio, Inc., FCC 85-578 at ¶ 7 (November 4, 1985) available at 1985 WL 193883. The FCC's statement, in this instance, is dispositive on the question of implicit intent to preempt. *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. at 713, citing *Chevron USA, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

Given the FCC's explicit statement of its intention to preempt local regulation of RFI, federal preemption of Petitioner's Interference Amendment does not violate the Tenth Amendment and the court's decision below was in all respects proper, leaving review by this Court unnecessary.

IV. THE COURT BELOW PROPERLY APPLIED THE LEGAL PRINCIPLES ESTABLISHED BY THIS COURT IN DETERMINING THAT FEDERAL LAW IMPLIEDLY PREEMPTED PETITIONER'S INTERFERENCE AMENDMENT.

Petitioner contends that not only was the court's decision below erroneous, but that the court below failed to consider and apply the legal standards for preemption analysis articulated by this Court. This is simply not true.

In a well-reasoned and thorough opinion, the court below unanimously confirmed the district court's grant of summary judgment to Respondent and, in doing so, correctly applied this Court's legal standards for the analysis of the preemption question presented. Specifically, the court below recognized Congress' preemption power over state and local ordinances as articulated by this Court in its holdings in, among other cases, *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991); *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996); *English v. General Elec. Company*, 496 U.S. 72, 79 (1990); and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Furthermore, contrary to Petitioner's contention that the court below failed to consider and apply the legal standards set by this Court in *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707 (1985), the court below expressly addressed and rejected Petitioner's reliance on the *Hillsborough* decision. (Pet. App. 15a-16a).

> Although the [Petitioner] relies on *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707 (1985), the case does not support their argument. The Supreme Court in

> *Hillsborough* upheld a county ordinance regulating health — an area of traditional state power — despite federal regulation in the area. However, the court found no implied preemption because the federal agency explicitly stated its intention *not* to preempt state and local regulations. *See Id.* at 714, 716. Thus, *Hillsborough* is inapplicable here because the FCC has explicitly stated its intention *to preempt* local regulations on RFI, *see In re Mobilecomm*, to F.C.C.R. 5519; *In re 960 Radio*, FCC 85-578, 1985 WL 193883, and the statutes and legislative history support Congress' intent to occupy the field of RFI issues.

(Pet. App. A15a-16a).

Petitioner also seeks this Court's review of the decision below in order to have this Court determine whether Petitioner's regulation falls within the scope of field preemption. (Pet. 15). Review of this issue, however, is not necessary as this Court has previously recognized not only the exclusive nature of the FCC's authority in connection with technical matters, such as RFI, but also the stated objectives of the Federal Communications Act of 1934 to provide a "unified and comprehensive regulatory system for the [radio transmission] industry" and "to maintain control of the United States over all channels of radio transmission." *See, e.g., Head*, 374 U.S. at 430 n.6; *National Broadcasting Co.*, 319 U.S. at 214-217. Permitting Petitioner's attempt at regulating RFI would seriously impede the FCC's ability to carry out its statutory mandate of administering a "unified and comprehensive regulatory system" for the telecommunications industry. *See FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940). Furthermore, as noted by the

court below, "[a] patchwork of varied local regulations across the country would prevent a functional national telecommunications network", and frustrate the objectives of federal law. (Pet. App. A, 17a). As such, no question as to the Communications Act's implied preemption over Petitioner's attempts to regulate RFI through its Interference Amendment exists which merits this Court's review.

CONCLUSION

Petitioner's conclusion suggests that "if the opinion below is allowed to stand, . . . Petitioner will be dependent upon non-local federal procedures to **resolve instances of interference** with public safety operations. . . ." (Pet. 17) (emphasis added). Of course, avoiding multiple and varied local procedures to resolve instances of RFI, an area within the FCC's exclusive jurisdiction, is wholly consistent with the "clear and manifest" intent of Congress to provide a "unified and comprehensive regulatory system for the [radio airwave transmission] industry." The fact that Petitioner's police, fire, and emergency service providers may not be fully comfortable with the administrative remedies which are clearly available to Petitioner in the event of an RFI incident, simply does not warrant this Court's review of its well-established legal standards for analysis of implied preemption of state and local regulations by federal law.

Both the district court and the circuit court of appeals below correctly found Petitioner's Interference Amendment impliedly preempted by the Federal Communications Act of 1934, as amended. As such, and for all the foregoing reasons, no just cause exists for this Court's review of those decisions at this time and Petitioner's Petition should be denied.

Respectfully submitted,

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